

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
AMERICAN CIVIL LIBERTIES)	
UNION OF MASSACHUSETTS, INC.,)	
)	C.A. No. _____
Plaintiff,)	
)	
v.)	COMPLAINT
)	
U.S. DEPARTMENT OF HOMELAND)	
SECURITY, and U.S. CUSTOMS)	
AND BORDER PROTECTION,)	
)	
Defendants.)	
_____)	

INTRODUCTION

1. Construction of a wall along the U.S.-Mexico border has been a centerpiece of President Trump’s public agenda throughout his campaign and presidency. Although the President initially promised that Mexico would pay for this wall, he is currently seeking funding from the United States treasury.

2. In December 2018, President Trump rejected appropriations legislation, purportedly because it did not include approximately \$5 billion for a border wall. As a result, appropriations lapsed for certain government agencies, including the Department of Homeland Security (“DHS”). A partial shutdown of the federal government began on December 22, 2018. Among other things, this shutdown resulted in border security personnel being furloughed or forced to work without pay, and impaired federal aviation safety and security programs.

3. On December 24—two days after the shutdown began—President Trump announced that he “*just gave out a 115 mile long contract for another large section of the Wall*

in Texas” (emphasis added). On information and belief, neither the President nor his administration has publicly released further information concerning the terms of this contract, the procedure by which it was awarded, the scope of the contracted project, or the source of the associated funding.

4. On December 28, 2018, the ACLU of Massachusetts (“ACLUM”) submitted a request to DHS under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for the “contract” referenced in the President’s announcement and related documentation, including requests for proposal (“RFPs”), purchase orders, invoices, sole source justification documents, and studies of cost, efficacy, and/or environmental impact. The request was subsequently assigned to U.S. Customs and Border Protection (“CBP”), a component of DHS, for action.

5. Release of these records, or an acknowledgment that they do not exist, is important to inform the public’s understanding of the debate about building a border wall, about the recent government shutdown, and about potential future actions by the President.

6. To begin, a response to the request could reveal the cost, nature, scope, and projected environmental and community impacts of the contemplated project. A response would also assist the public in assessing whether the President: (a) has violated any laws or regulations pertaining to the procurement of federal contracts; (b) has violated the U.S. Constitution by expending funds not appropriated for that purpose by Congress; (c) has provided the public with inaccurate information concerning border security matters; and (d) might be inclined to provide the public with inaccurate information concerning these matters in the future, for example by claiming that a border wall is being or has been built, even if that is not true.

7. Additionally, an immediate response is critical to informing the public about ongoing, time-sensitive policymaking processes. On January 25, 2019, President Trump signed

a federal appropriations bill, which temporarily ended the government shutdown. The bill did not include funding for a border wall. These new appropriations will reportedly lapse on February 15, 2019. President Trump stated on January 25, 2019, that:

We really have no choice but to build a powerful wall or steel barrier. If we don't get a fair deal from Congress, the government will either shut down on February 15th again, or I will use the powers afforded to me under the laws and Constitution of the United States to address this emergency.

By February 14, 2019, the President had failed to secure sufficient funds from Congress to construct his proposed border wall. The President consequently announced his intention to declare a state of domestic emergency relating to the U.S.-Mexico border. On information and belief, this “emergency” declaration will be used as a purported basis to divert federal funds appropriated for other purposes to fund the construction of the President’s proposed border wall. The public and their elected representatives therefore have an *immediate* need to understand whether the President has a history of misrepresenting facts and/or violating the law in connection with the situation at the U.S.-Mexico border.

8. DHS and CBP have not, to date, produced the requested records as required by law.

9. Accordingly, ACLUM hereby requests that the Court order that, within seven days of service, DHS and CBP shall (1) each answer this Complaint; (2) each make evidentiary submissions stating whether or not the referenced “contract” actually exists; and (3) collectively either produce all requested documents or make evidentiary submissions explaining their factual and legal bases for asserting that such documents cannot or should not be produced, in whole or in part. To the extent DHS and CBP resist producing any of the requested documents, ACLUM further requests that the Court order the defendants to produce them as soon as possible, following, if necessary, expedited discovery and briefing. *See* 28 U.S.C. § 1657.

PARTIES

10. The American Civil Liberties Union of Massachusetts, Inc. (“ACLU”) is a Massachusetts non-profit corporation with its principal place of business in Boston, Massachusetts. ACLU’s mission is to defend freedoms guaranteed in the Constitution and Bill of Rights and to educate the public about civil rights and civil liberties.

11. The United States Department of Homeland Security (“DHS”) is a department of the United States government. Its components include U.S. Customs and Border Protection (“CBP”), the U.S. Coast Guard (the “Coast Guard”), U.S. Immigration and Customs Enforcement (“ICE”), and the Transportation Security Administration (“TSA”).

JURISDICTION AND VENUE

12. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

13. Venue lies in the District of Massachusetts pursuant to 5 U.S.C. § 552(a)(4)(B), including because it is the district in which ACLU has its principal place of business.

FACTS ALLEGED

I. Construction of a wall on the U.S.-Mexico border is a cornerstone of President Trump’s public policy agenda.

14. Before President Trump’s election, the U.S. government had already constructed substantial physical barriers at various locations along the U.S.-Mexico border. According to the U.S. Government Accountability Office (“USGAO”), “from fiscal year 2005 through fiscal year 2015, CBP increased the total miles of primary barriers on the southwest border from 119 miles

to 654 miles—including 354 miles of primary pedestrian barriers and 300 miles of primary vehicle barriers.”¹

15. According to the USGAO, “CBP suspended its efforts to measure the contribution of border fencing to border security in 2013,” and, as of early 2017, “CBP [could not] measure the contributions of border fencing to border security operations.”²

16. Independent studies, however, have shown that physical barriers on the border come at high cost and offer minimal return on investment. A recent study sponsored by non-partisan public interests groups found that the construction of physical barriers at the border inflicted serious damage on border communities and sensitive natural environments, but did not significantly reduce smuggling or immigration.³ Another recent study by economists at Stanford and Dartmouth found that the expenditure of \$2.3 billion to construct physical barriers at the border reduced migration flows by less than 1%.⁴

17. Nevertheless, President Trump has made the construction of a massive border wall a centerpiece of his public policy agenda.

18. During his presidential campaign, then-candidate Trump repeatedly proposed to construct a 1,000-mile border wall at Mexico’s expense. For example, by August 2015, the Trump campaign website asserted that “[t]here must be a wall across the southern border,” and

¹ <https://www.gao.gov/assets/700/693488.pdf>

² <https://www.gao.gov/assets/690/682838.pdf>

³ https://www.aclu.org/sites/default/files/field_document/aclu-report-updates_0.pdf

⁴ <http://stanford.edu/~memorten/ewExternalFiles/ADM%20-%20Border%20Walls%20-%20Executive%20Summary.pdf>

“Mexico must pay for the wall.”⁵ In October 2015, during a presidential debate, Trump asserted that “we’re going to build a wall,” that “we actually need 1,000 [miles of wall construction],” and that “Mexico’s going to pay for the wall.”⁶ And in August 2016, as the election approached, Trump announced that “Mexico’s gonna pay for the wall, and that’s an easy one.”⁷

19. On information and belief, from November 2016 to the present, the Mexican government has not paid any funds to the United States government for construction of a wall on the U.S.-Mexico border.

20. Nevertheless, on January 25, 2017, President Trump issued Executive Order 13767, entitled “Border Security and Immigration Enforcement Improvements” (“EO 13767”).⁸ Among other things, the Order stated that “[i]t is the policy of the executive branch to . . . secure the southern border of the United States through the immediate construction of a physical wall on the southern border.” The Order directed the Secretary of Homeland Security to “immediately take the following steps to obtain complete operational control . . . of the southern border” and to “take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border.” The Order further required that, rather than using funds provided by Mexico, the Secretary of Homeland Security should “[i]dentify and, to the extent permitted by law, allocate all sources of *Federal funds* for the planning, designing, and constructing of a physical wall along the southern border” (emphasis added).

⁵ <https://web.archive.org/web/20150816161349/https://www.donaldjtrump.com/positions/immigration-reform>

⁶ <http://time.com/4091301/republican-debate-transcript-cnbc-boulder/>

⁷ <https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html>

⁸ <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>

21. According to a July 2018 USGAO report, CBP, which is a component of DHS, issued RFPs for “physical barrier prototype designs for the southwest border” in March 2017, and conducted testing of the prototypes later that year.⁹ The USGAO found, however, that DHS’s methodology for prioritizing deployment of additional barriers “did not include analysis of the costs associated with deploying barriers in each location or segment, which can vary depending on topography, land ownership, and other factors,” resulting in a lack of “complete information for prioritizing locations to use its resources in the most cost-effective manner.” The USGAO further found that “for one of the two approved segments” of the proposed barrier, DHS “has not documented its plans as required” by DHS’s acquisition process. Ultimately, the USGAO concluded in July 2018 that:

DHS plans to spend billions of dollars developing and deploying new barriers along the southwest border. *However, by proceeding without key information on cost, acquisition baselines, and the contributions of previous barrier and technology deployments, DHS faces an increased risk that the Border Wall System Program will cost more than projected, take longer than planned, or not fully perform as expected.*

(emphasis added).

22. In 2017 and 2018, Congress reportedly appropriated more than \$1.5 billion for the construction and expansion of physical barriers at the U.S.-Mexico border.¹⁰ On December 12, 2018, DHS announced that this funding is sufficient for construction of approximately 124 miles of new physical barriers at various border locations in California, Texas, and Arizona. DHS further stated that at least 31 miles of these new barriers have already been completed, and that at

⁹ <https://www.gao.gov/assets/700/693488.pdf>

¹⁰ https://www.washingtonpost.com/news/fact-checker/wp/2018/04/05/president-trump-says-his-beautiful-wall-is-being-built-nope/?utm_term=.e596349eald

least an additional nine miles are in progress and scheduled for completion in early 2019. On information and belief, DHS has not yet announced the current status of the remaining 84 miles of funded construction.¹¹

23. On information and belief, appropriations for various federal government operations—including for DHS—were scheduled to lapse beginning December 22, 2018.

24. On December 11, 2018, President Trump met with then-House Minority Leader (now-Speaker of the House) Nancy Pelosi and Senate Minority Leader Chuck Schumer, along with the Vice President and various members of the media, at the White House. During that meeting, President Trump stated:

If we don't have border security, we'll shut down the government. This country needs border security. The wall is a part of border security. . . . I would say if we got \$5 billion, we could do a tremendous chunk of wall. . . . We have to have the wall. This isn't a question, this is a national emergency. . . . If we don't get what we want, one way or the other, whether it's through you, through the military, through anything you want to call, I will shut down the government. . . . I will take the mantle, I will be the one to shut it down. . . . And I'm going to shut it down for border security.

(emphasis added).

25. Following this meeting, Congress did not pass appropriations legislation that included \$5 billion for a border wall. On information and belief, appropriations for various federal agencies, including DHS, lapsed beginning December 22, 2018, resulting in a partial government shutdown.

26. During this shutdown beginning December 22, 2018, hundreds of thousands of federal employees were either furloughed or required to work without pay, including DHS

¹¹ <https://www.dhs.gov/news/2018/12/12/walls-work>

employees responsible for border security at CPB¹² and in the Coast Guard.¹³ The Coast Guard's Employee Assistance Program reportedly began advising Coast Guard employees to supplement their income through garage sales, pet walking, and babysitting.¹⁴

27. The shutdown also threatened federal aviation safety and security programs. On January 23, 2018, the President of the National Air Traffic Controllers Association issued a statement explaining that “[d]ue to the shutdown, air traffic controllers, [TSA] officers, safety inspectors, air marshals, federal law enforcement officers, FBI agents, and many other critical workers have been working without pay for over a month.”¹⁵ He further noted that “TSA management announced that a growing number of officers cannot come to work due to the financial toll of the shutdown,” and “[m]ajor airports are already seeing security checkpoint closures.” He stated that “we cannot even calculate the level of risk currently at play, nor predict the point at which the entire system will break.”

28. On the morning of January 25, 2019, LaGuardia Airport in New York reportedly implemented a “ground stop” on all aircraft due to staffing shortages among air traffic control

¹² *E.g.*, https://www.washingtonpost.com/politics/2019/01/09/border-protection-officers-union-sues-trump-administration-over-shutdown-after-missed-paycheck/?noredirect=on&utm_term=.87a60e29264b

¹³ *E.g.*, <https://www.nbcnews.com/politics/politics-news/42-000-coast-guard-members-miss-first-paycheck-due-government-n958616>

¹⁴ https://www.washingtonpost.com/national-security/2019/01/09/coast-guard-families-told-they-can-have-garage-sales-cope-with-government-shutdown/?utm_term=.0b76c5c8177e

¹⁵ https://www.afacwa.org/air_traffic_controllers_pilots_flight_attendants_detail_serious_safety_concerns_due_to_shutdown

personnel.¹⁶ Staffing-related delays were also reported at Newark Liberty International Airport and Philadelphia International Airport that same day.¹⁷

29. On the afternoon of January 25, 2019, President Trump announced that he would sign a federal appropriations bill that funds the federal government until February 15, 2019.¹⁸ In his statement, President Trump explained that:

We really have no choice but to build a powerful wall or steel barrier. *If we don't get a fair deal from Congress, the government will either shutdown on February 15th again, or I will use the powers afforded to me under the laws and Constitution of the United States to address this emergency.* We will have great security.

(emphasis added).

30. On February 14, 2019, having failed to secure sufficient funds from Congress to construct his proposed border wall, the President announced his intention to declare a state of domestic emergency relating to the U.S.-Mexico border. On information and belief, this “emergency” declaration will be used as a purported basis to divert federal funds appropriated for other purposes to fund the construction of the President’s proposed border wall.

II. The President’s announcement during the shutdown that he awarded a contract for 115 miles of border wall construction, ACLUM’s request for that contract, and DHS’s failure to provide the requested records or otherwise respond as required by law.

31. On December 24, 2018—two days after DHS funding lapsed and the shutdown began—President Trump made an announcement (the “Announcement”) that:

¹⁶ <https://www.nbcnewyork.com/news/local/LaGuardia-Airport-Ground-Stop-Staffing-Shortage-Shutdown-504861791.html>

¹⁷ <https://www.npr.org/2019/01/25/688660390/flights-delayed-at-laguardia-newark-airports-as-workers-call-in-sick-amid-shutdo>

¹⁸ <https://www.youtube.com/watch?v=3UtH1kCicGY>

*I am in the Oval Office & just gave out a 115 mile long contract for another large section of the Wall in Texas.*¹⁹

32. The Announcement did not explain how the President's decision to "g[i]ve out" this contract complied with the laws and regulations governing federal procurement.

33. The Announcement did not explain the source of the funding for this contract.

34. On information and belief, at the time of the Announcement, appropriations for DHS had lapsed, and Congress had not appropriated funds for construction of an additional 115 miles of the President's proposed border wall.

35. According to DHS's statement earlier in December 2018, remaining funds from prior appropriations would permit the construction of no more than 84 miles of new physical barriers at the border, and at least 50% of those remaining funds were already designated for construction projects outside of Texas.²⁰

36. On information and belief, neither the President nor his administration has publicly released further information concerning the terms of the "contract" referenced in the Announcement, the procedure by which it was awarded, the scope of the contracted project, or the source of the associated funding.

37. On December 28, 2018, ACLUM submitted a FOIA request (the "Request") to DHS for (a) the "contract" referenced in the Announcement; and (b) all purchase orders, invoices, RFPs, documentation of selection, sole source or limited source justification and approval documents, studies of cost, efficacy, and/or environmental impact, and other

¹⁹ <https://twitter.com/realDonaldTrump/status/1077329121745793025>

²⁰ <https://www.dhs.gov/news/2018/12/12/walls-work>

memoranda and documentation pertaining to the “contract” referenced in the Announcement. *See* Ex. A (Request).

38. On January 14, 2019, DHS sent ACLUM a letter regarding the Request (the “DHS Letter”). The DHS Letter stated that it was “not a denial” of the Request. The DHS Letter stated that the Request was “too broad in scope or did not specifically identify the records which [ACLUM is] seeking.” The DHS Letter requested that ACLUM provide “the specific DHS contract numbers of interest,” as reflected in the Federal Procurement Database System (“FPDS”) website. The DHS Letter also requested that ACLUM identify the specific “funding component” within DHS for the contract at issue. *See* Ex. B (Response).

39. On January 16, 2019, ACLUM replied to the DHS Letter (the “Reply”). In the Reply, ACLUM explained that the Request did, in fact, adequately describe the requested records. Further, the Reply explained that a search of the FPDS website did not reveal any contract matching the description in the President’s announcement, and therefore it is not possible to provide a specific contract number or funding component for the requested records. The Reply asked that DHS “determine whether DHS will comply with the Request.” *See* Ex. C (Reply).

40. On January 28, 2019, DHS assigned CBP to respond to the Request. *See* Exs. D (Jan. 28, 2019 letter), E (Jan. 31, 2019 email). On January 31, 2019, CBP acknowledged its responsibility to respond to the Request. *See* Ex. F (Jan. 31, 2019 letter). Since January 31, 2019, CBP has not provided any further substantive response or any of the requested documents.²¹

²¹ On February 12, 2019, CBP notified ACLUM that the tracking number for the Request had been amended. *See* Ex. G.

41. It is in the public interest for DHS and CBP to release records that will permit the public and its elected representatives to assess whether the “contract” referenced in the Announcement actually exists and, if so, the cost, nature, and scope of contemplated project.

42. It is in the public interest for DHS and CBP to release records that will permit the public and its elected representatives to assess whether the President has violated any laws or regulations pertaining to the procurement of federal contracts, and whether the President has violated the U.S. Constitution by expending funds not appropriated for that purpose by Congress.

43. It is in the public interest for DHS and CBP to release records that will permit the public and its elected representatives to conduct a properly informed debate concerning ongoing and proposed security operations at the U.S.-Mexico border.

44. It is in the public interest for DHS and CBP to release, on an expedited basis, records that will permit the public and its elected representatives to conduct a properly informed debate concerning the President’s declaration of a state of domestic emergency.

45. It is in the public interest for DHS and CBP to release, on an expedited basis, records that will permit the public and its elected representatives to make an informed assessment of whether the President has provided false and untrustworthy information to the public regarding the situation at the U.S.-Mexico border.

46. It is in the public interest for DHS and CBP to release, on an expedited basis, records that will permit the public and its elected representatives to make an informed assessment of whether any future statements by the President, particularly about the status of construction of the proposed border wall, are truthful.

47. Although not required, ACLUM has taken reasonable steps to exhaust alternative sources of this information. On information and belief, the U.S. Army Corps of Engineers (the

“Corps of Engineers”) is involved in federal contracting relating to the construction of physical barriers at the U.S.-Mexico border.²² ACLUM requested the “contract” referenced in the Announcement from the four Corps of Engineers districts that are responsible for the U.S.-Mexico border region. *See* Exs. H, I, J, K. Three of those districts transferred the requests to the Fort Worth district, which has been designated to centrally process FOIA requests to the Corps of Engineers regarding the proposed border wall. *See* Exs. L, M, N. The Fort Worth district, in turn, has stated that it has “no records” concerning the purported contract referenced in the President’s Announcement. *See* Ex. O. It appears that only DHS and CBP can complete the picture.

CLAIM FOR RELIEF

Violation of FOIA 5 U.S.C. § 552

48. The foregoing allegations are re-alleged and incorporated herein.
49. Defendants have failed to make reasonable efforts to search for records sought by the Request.
50. Defendants have failed to timely produce any records responsive to the Request.
51. ACLUM has exhausted administrative remedies to the extent required by law.

PRAYER FOR RELIEF

Wherefore, Plaintiff asks this Court to GRANT the following relief:

1. Expedite consideration of this action, including pursuant to 28 U.S.C. § 1657;
2. Order that DHS and CBP shall answer this Complaint within seven days of service;

²² <https://www.al.com/news/2019/01/army-could-hire-contractors-to-build-trumps-wall.html>

3. Order that, within seven days of service, DHS and CBP shall each to make an evidentiary submission stating whether or not the referenced “contract” actually exists;
4. Order that, within seven days of service, DHS and CBP each shall either produce all requested documents or make evidentiary submissions explaining their factual and legal bases for asserting that such documents cannot or should not be produced;
5. Order that, as soon as possible, DHS and CBP shall produce all records responsive to the Request, following, to the extent necessary, expedited discovery and briefing;
6. Enjoin DHS and CBP from charging ACLUM search, review, or duplication fees for processing the Request;
7. Award ACLUM costs and reasonable attorney fees incurred in this action; and
8. Grant such other relief as the Court may deem just and proper.

February 15, 2019

Respectfully submitted,

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